No. 02-634

Supreme Court, U.S.
FILED
NOV 25 2002
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

GREEN TREE FINANCIAL CORP. A/K/A GREEN TREE ACCEPTANCE CORP. A/K/A GREEN TREE FINANCIAL SERVICES CORP. N/K/A CONSECO FINANCE CORP.,

Petitioner,

v.

LYNN W. BAZZLE AND BURT A. BAZZLE, IN A REPRESENTATIVE CAPACITY ON BEHALF OF A CLASS AND FOR ALL OTHERS SIMILARLY SITUATED; DANIEL B. LACKEY, GEORGE BUGGS AND FLORINE BUGGS, IN A REPRESENTATIVE CAPACITY ON BEHALF OF A CLASS AND FOR ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

BRIEF FOR AMERICAN BANKERS ASSOCIATION, AMERICAN FINANCIAL SERVICES ASSOCIATION, AND CONSUMER BANKERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

LOUIS R. COHEN
Counsel of Record
CHRISTOPHER R. LIPSETT
ERIC J. MOGILNICKI
MICHAEL D. LEFFEL
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

Counsel for Amici Curiae

NOVEMBER 25, 2002

QUESTION PRESENTED

Whether the Federal Arbitration Act, 9 U.S.C. §§ 1-16, prohibits class-action procedures from being superimposed onto an arbitration agreement that does not provide for class-action arbitration.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT OF INTEREST OF *AMICI CURIAE* 2

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. THIS COURT SHOULD GRANT THE WRIT BECAUSE FORCED CLASS ARBITRATION IS CONTRARY TO THE FAA AND FUNDAMENTALLY UNFAIR. 5

A. The FAA Requires Courts To Enforce the Arbitration Agreement As Written. 5

B. Forced Class Arbitration Is Unfair to Absent Class Plaintiffs and to Defendants. 8

1. *Forced "Class Arbitrations" May Not Be Binding on Absent Plaintiff "Class" Members.* 9

2. *Forced Class Arbitration Is Unfair to Defendants.* 11

II. FORCED CLASS ARBITRATION IS AN ATTACK ON ARBITRATION ITSELF. 12

A. Forced Class Arbitration Threatens the Viability of Arbitration Agreements in Consumer Contracts. 13

B. Parties May Not Be Able To Avoid the Issues in This Case by Drafting Around Them. 15

CONCLUSION 17

TABLE OF AUTHORITIES

CASES

Page(s)

ACORN v. Household International, Inc., 211 F. Supp. 2d 1160 (N.D. Cal. 2002) 15
Ainsworth v. Skurnick, 960 F.2d 939 (11th Cir. 1992) 12
Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995) 5, 7, 13
Baron v. Best Buy Co., No. 99-14028, slip op. (11th Cir. June 1, 2001) 16
Blue Cross v. Superior Court, 78 Cal. Rptr. 2d 779 (Ct. App. 1998) 6, 14
Bowen v. First Family Financial Services, Inc., 233 F.3d 1331 (11th Cir. 2000) 16
Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996) 14
Champ v. Siegel Trading Co., 55 F.3d 269 (7th Cir. 1995) 5, 6
Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001) 5, 7
Comb v. Paypal, Inc., 218 F. Supp. 2d 1165 (N.D. Cal. 2002) 15
Dickler v. Shearson Lehman Hutton, Inc., 596 A.2d 860 (Pa. Super. Ct. 1991) 6, 14
Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681 (1996) 17
Dominium Austin Partners, LL v. Emerson, 248 F.3d 720 (8th Cir. 2001) 6
First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995) 7
Flexible Manufacturing Systems Pty. Ltd. v. Super Products Corp., 86 F.3d 96 (7th Cir. 1996) 12
Gammaro v. Thorp Consumer Discount Co., 828 F. Supp. 673 (D. Minn. 1993) 6

TABLE OF AUTHORITIES—Continued

Page(s)

General Telephone Co. v. Falcon, 457 U.S. 147 (1982) 14
Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) 7, 16
Hale v. First USA Bank, N.A., No. 00CIV5406JGK, 2001 WL 687371 (S.D.N.Y. June 19, 2001) 16
Hansberry v. Lee, 311 U.S. 32 (1940) 8, 10
In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir 1995) 12
Johnson v. West Suburban Bank, 225 F.3d 366 (3d Cir. 2000) 16
Keating v. Superior Court, 645 P.2d 1192 (Cal. 1982), *rev'd in part on other grounds sub nom. Southland Corp. v. Keating*, 465 U.S. 1 (1984) 6, 14
Leonard v. Terminix International Co., L.P., No. 1010555, 2002 WL 31341084 (Ala. Oct. 18, 2002) 16
Lozada v. Dale Baker Oldsmobile, Inc., 91 F. Supp. 2d 1087 (W.D. Mich. 2000) 16
Lloyd v. MBNA America Bank, N.A., No. Civ.A. 00-109-SLR, 2001 WL 194300 (D. Del. Feb. 22, 2001) 16
Lytle v. CitiFinancial Services, Inc., No. 42 EDA 2001, 2002 WL 31388882 (Pa. Super. Ct. Oct. 24, 2002) 16
Marsh v. First USA Bank, N.A., 103 F. Supp. 2d 909 (N.D. Tex. 2000) 16
Martin v. Wilks, 490 U.S. 755 (1989) 8
Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995) 6
McCarthy v. Providential Corp., No. C 94-0627 FMS, 1994 WL 387852 (N.D. Cal. July 19, 1994) 6

TABLE OF AUTHORITIES—Continued

Page(s)

Med Center Cars, Inc. v. Smith, 727 So. 2d 9 (Ala. 1998) 6
Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999) 8
Pennoyer v. Neff, 95 U.S. 714 (1877) (mem.) 8
Perry v. Thomas, 482 U.S. 483 (1987) 6, 17
Press Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) 10
Randolph v. Green Tree Financial Corp.—Alabama, 244 F.3d 814 (11th Cir. 2001) 16
Raytheon Co. v. Automated Business Systems, Inc., 882 F.2d 6 (1st Cir. 1989) 11
Remmey v. Paine Webber, Inc., 32 F.3d 143 (4th Cir. 1994) 15
Rodriquez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) 7
Sagal v. First USA Bank, N.A., 69 F. Supp. 2d 627 (D. Del. 1999), *aff'd*, 254 F.3d 1078 (3d Cir. 2001) 16
Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987) 16
Sobel v. Hertz, Warner & Co., 469 F.2d 1211 (2d Cir. 1972) 11
Southland Corp. v. Keating, 465 U.S. 1 (1984) 6, 17
Stein v. Geonerco, Inc., 17 P.3d 1266 (Wash. Ct. App. 2001) 6
Szetela v. Discover Bank, 118 Cal. Rptr. 2d 862 (Ct. App. 2002) 16
Ting v. AT&T, 182 F. Supp. 2d 902 (N.D. Cal. 2002), *appeal filed*, No. 02-15416 (9th Cir. 2002) 16
United States Parole Commission v. Geraghty, 445 U.S. 388 (1980) 11
United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) 9, 11

TABLE OF AUTHORITIES—Continued

Page(s)

Volt Information Sciences, Inc. v. Board of Trustees, 489 U.S. 468 (1989) 6, 7
Zawikowski v. Beneficial National Bank, No. 98C2178, 1999 WL 35304 (N.D. Ill. Jan. 11, 1999) 16

STATUTES AND RULES

Federal Arbitration Act, 9 U.S.C. §§ 1-16 ..... 3, 5
9 U.S.C. § 10 12
Fed. R. Civ. P. 23 ..... 8, 12

LEGISLATIVE AUTHORITIES

H.R. Rep. No. 97-542 (1982) 5, 13
S. Rep. No. 68-536 (1924) 13

ADMINISTRATIVE AGENCY MATERIALS

SEC, Order Approving Proposed Rule Change Relating to the Exclusion of Class Actions from Arbitration Proceedings, 57 Fed. Reg. 52,659 (Nov. 4, 1992) 15

BOOKS, ARTICLES & TREATISES

Class Wide Arbitration: Efficient Adjudication or Procedural Quagmire?, 67 Va. L. Rev. 789 (1981) 14
Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973) 12
Steven A. Meyerowitz, *The Arbitration Alternative*, 71 A.B.A. J. 78 (1985) 11
Herbert Newberg & Alba Conte, *Newberg on Class Actions* (3d ed. 1992) 10, 14
Judith Resnik, *Money Matters: Judicial Market* Interventions *Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. Pa. L. Rev. 2119 (2000) 9

TABLE OF AUTHORITIES—Continued

Page(s)

Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 Wm. & Mary L. Rev. 1 (2000) 10

In the Supreme Court of the United States

No. 02-634

GREEN TREE FINANCIAL CORP. A/K/A GREEN TREE ACCEPTANCE CORP. A/K/A GREEN TREE FINANCIAL SERVICES CORP. N/K/A CONSECO FINANCE CORP.,

Petitioner,

v.

LYNN W. BAZZLE AND BURT A. BAZZLE, IN A REPRESENTATIVE CAPACITY ON BEHALF OF A CLASS AND FOR ALL OTHERS SIMILARLY SITUATED; DANIEL B. LACKEY, GEORGE BUGGS AND FLORINE BUGGS, IN A REPRESENTATIVE CAPACITY ON BEHALF OF A CLASS AND FOR ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

BRIEF FOR AMERICAN BANKERS ASSOCIATION, AMERICAN FINANCIAL SERVICES ASSOCIATION, AND CONSUMER BANKERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

This *amici curiae* brief[1] is submitted in support of the petitioner, Green Tree Financial Corp. a/k/a Green Tree Acceptance Corp. a/k/a Green Tree Financial Services Corp.

[1] Pursuant to Supreme Court Rule 37.6, *amici* state that the brief was prepared in its entirety by *amici curiae* and their counsel. No monetary contribution toward the preparation or submission of this brief was made by any person other than *amici curiae*, their members, and their counsel.

n/k/a Conseco Finance Corp. By letters filed with the Clerk of the Court, petitioner and respondents have consented to the filing of this brief.

STATEMENT OF INTEREST OF *AMICI CURIAE*

The American Bankers Association ("ABA") is the principal national trade association of the banking industry in the United States. Its members are located in all fifty states and the District of Columbia and include banks of all types and sizes—money center banks, regional banks and community banks. ABA members hold approximately ninety percent of the domestic assets of United States banks. The ABA frequently appears in litigation as an *amicus curiae* where the issues raised are of widespread importance to banks or consumers of banking services. Many ABA member banks provide in their consumer loan agreements and deposit contracts for arbitration of disputes. Some of those agreements are silent as to class-action procedures, and others expressly state that class arbitrations are not permitted.

The American Financial Services Association ("AFSA") was organized in 1916 and represents more than 300 companies that engage in lending and sales financing amounting to approximately twenty percent of all consumer credit in the United States. These companies range from independently-owned consumer finance offices to the nation's largest financial-services, retail, and automobile sales finance companies. AFSA's membership includes national and state banks that operate multi-state consumer credit programs. Some AFSA members include arbitration agreements in their consumer loan documents.

The Consumer Bankers Association ("CBA") was founded in 1919 to provide a progressive voice for the retail banking industry. CBA members hold more than 900 bank and thrift charters, with total assets of more than $2.9 trillion, and are leaders in the areas of consumer, auto, home equity and education finance, bank sales of investment products, small business services and community development. Some

CBA members include arbitration agreements in their consumer loan documents and deposit contracts.

SUMMARY OF ARGUMENT

Amici agree with petitioner that the Court should grant the writ to resolve the split between the majority view that arbitration agreements should be enforced as written, and the minority view that a type of class action procedure can be imposed on parties who have not agreed to it. *Amici* write to stress the importance of correcting the error of the Supreme Court of South Carolina, because of the undesirable consequences of forced class arbitrations. *Amici* make three main points.

1. The whole theory of the Federal Arbitration Act (the "FAA" or "Act"), 9 U.S.C. §§ 1-16, is that firms and individuals have the right to bargain about the mechanism they will use to resolve future disputes, and their bargains should be enforced. The basis for arbitration is private contracts. The enforceability of private contracts, on this and other subjects, is of course at the heart of our legal system, and the Act was adopted because judicial hostility to arbitration was wrongfully rendering this kind of private contract effectively unenforceable. Imposing an obligation to arbitrate in a procedure to which a person did not agree, or including parties that such person did not agree to include, violates the most basic terms of the Act.

2. Forced class arbitrations are necessarily unfair to absent plaintiff "class" members and to defendants. First, it obviously will be argued that it is unfair to bind absent class members to the results of an arbitration, for the most basic of reasons: they have not agreed to have their claims resolved by this particular private decision maker. Without delving deeply into the reasons for this, it is fair to say that all persons within the courts' respective jurisdictions are inherently bound by the decisions of courts created by constitutions and statutes to resolve disputes. But no person is bound by the decisions of a private decision maker unless he has agreed to

be bound. This is not merely a matter of notice, the argument goes: a person has no obligation to respond to such a notice, or to give up any rights after receiving a notice, unless he has agreed to the decision making procedure. Second, it is obviously also unfair to subject a defendant to a forced class arbitration in which if he wins he defeats only the named plaintiffs but if he loses the rest of the "class" can latch on. That is not what happens in true, judicial class actions, and this kind of one-sided class procedure would obviously make arbitration an unacceptable alternative for the party (such as a lender) that stands to win only against an individual but to lose to a "class." Such parties would simply avoid arbitration.

3. The decision of the court below reflects the old judicial hostility to arbitration in modern and more sophisticated dress. Its premise is that parties cannot arbitrate their disputes on an individual basis even if they have agreed to do so. That premise is at odds with the FAA and this Court's decisions. Moreover, even the courts favoring such an approach concede that it would require major ongoing court involvement in each class arbitration, injecting courts intimately and extensively into a process designed to avoid the costs and delays of litigation. Other courts have held, more directly, that arbitration agreements that fail to provide for class arbitration are unconscionable—a direct expression of the ancient hostility that this Court should, once again, make clear the FAA has banished.

Amici urge this Court to grant the writ to resolve these important issues and to ensure the continued viability of arbitration in consumer contracts.

ARGUMENT

I. THIS COURT SHOULD GRANT THE WRIT BECAUSE FORCED CLASS ARBITRATION IS CONTRARY TO THE FAA AND FUNDAMENTALLY UNFAIR.

Amici strongly believe that arbitration in accordance with the parties' written agreement is a fair and effective way to adjudicate disputes. As Congress found in 1982, "[t]he advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing ... dealings among the parties ...." H.R. Rep No. 97-542, at 13 (1982); *see also Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 111-12, 122-23 (2001). In particular, arbitration is "helpful to individuals ... complaining about a product, who need a less expensive alternative to litigation." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) (citation omitted). Forced class arbitration, by contrast, forfeits these advantages and is unfair to absent "class" plaintiffs and defendants.[2]

A. The FAA Requires Courts To Enforce the Arbitration Agreement As Written.

The fundamental policy of the Federal Arbitration Act (the "FAA" or "Act"), 9 U.S.C. §§ 1-16, is that courts should enforce private arbitration agreements in accordance with their terms, just as they enforce any other private agreement. The court below, however, joined the minority of courts in imposing on the parties before it an arbitration procedure

---

[2] A party who is deciding whether to agree to arbitration is making a decision whether the benefits of arbitration outweigh its limitations. Converting an agreement to arbitrate into a class arbitration, however, radically alters this calculus. For a court "to read such a term into the parties' agreement would disrupt the negotiated risk/benefit allocation and direct the parties to proceed with a different sort of arbitration." *Champ v. Siegel Trading Co.*, 55 F.3d 269, 275 (7th Cir. 1995) (internal quotations and brackets omitted).

wholly different from the one to which they agreed.[3] Such courts would apparently impose on absent class members various obligations in a proceeding they did not choose to bring, before a decision maker not selected in accordance with *their* arbitration agreements, in which they will not have the rights of participation they bargained for; and imposing on every one concerned an obligation to proceed together with a large number of parties and claims that no one agreed to include in the resolution of his, her or its disputes. The majority of courts confronted with this issue have held that arbitration agreements should be enforced based on their actual terms.[4]

Amici agree with petitioner that the Court should grant the writ to resolve this split in authority. The fundamental policy of the FAA, as this Court has repeatedly made plain, is that "private agreements to arbitrate are [to be] enforced according to their terms." *Volt Info. Scis., Inc. v. Board of Trs.*, 489 U.S. 468, 479 (1989); *see Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995); *Perry v. Thomas*, 482 U.S. 483, 492-93 n.9 (1987). That directive is not surprising because, after all, an arbitration clause is simply a contract between two parties to resolve their dispute in

[3] *See, e.g., Keating v. Superior Court*, 645 P.2d 1192 (Cal. 1982), *rev'd in part on other grounds sub nom. Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Blue Cross v. Superior Court*, 78 Cal. Rptr. 2d 779 (Ct. App. 1998); *Dickler v. Shearson Lehman Hutton, Inc.*, 596 A.2d 860 (Pa. Super. Ct. 1991).

[4] *See, e.g., Dominium Austin Partners*, 248 F.3d at 728; *Champ*, 55 F.3d at 275; *McCarthy v. Providential Corp.*, No. C 94-0627 FMS, 1994 WL 387852, at *8 (N.D. Cal. July 19, 1994) (a court "cannot compel arbitration on a class basis where the agreement did not specifically provide for it"); *Gammaro v. Thorp Consumer Disc. Co.*, 828 F. Supp. 673, 674 (D. Minn. 1993) ("The Court must give effect to the agreement of the parties, and this arbitration agreement makes no provision for class treatments of disputes. Accordingly, the Court finds that it is without power to order this matter to proceed to arbitration as a class action.") (footnote omitted); *Stein v. Geonerco, Inc.*, 17 P.3d 1266, 1271 (Wash. Ct. App. 2001); *Med Ctr. Cars, Inc. v. Smith*, 727 So. 2d 9, 20 (Ala. 1998).

a particular way. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) ("[A]rbitration is simply a matter of contract between the parties."). As such, an arbitration clause is enforced "like other contracts." *Volt Info. Scis.*, 489 U.S. at 478.

But early attempts to enforce arbitration agreements were met with hostility by the courts, "a judicial disposition inherited from then-longstanding English practice." *Circuit City Stores*, 532 U.S. at 111. Congress therefore passed the FAA "to overcome courts' refusals to enforce agreements to arbitrate." *Allied-Bruce Terminix*, 513 U.S. at 270 (citation omitted); *see also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991). In keeping with the FAA, this Court has emphatically rejected "the old judicial hostility to arbitration." *Rodriquez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 480-81 (1989). "[G]eneralized attacks on arbitration," *Gilmer*, 500 U.S. at 30, and the "suspicion of arbitration as a method of weakening the protections afforded in the substantive law . . . [have] fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes," *Rodriquez de Quijas*, 490 U.S. at 481 (citation omitted).

Just such a suspicion of arbitration is what led to the result below. The court asserted that "parties with nominal individual claims" would have no effective "avenue for relief." Pet. App. 22a. It therefore imposed a private decision making procedure to which neither those parties nor the absent "class members" who would become involved had agreed. As the majority of courts, including every federal court to reach the issue, have held, when an arbitration agreement is silent as to class arbitration, arbitration must proceed on an individual basis and courts and arbitrators are powerless to rewrite the parties' agreement to compel class arbitration.[5]

[5] *See, e.g.*, cases cited *supra* n.4

B. Forced Class Arbitration Is Unfair to Absent Class Plaintiffs and to Defendants.

The significance of the fact of forced class arbitration is not merely that the parties' agreement was not enforced based on its terms: forced class arbitration also raises fundamental issues of fairness to the parties. Exactly who is harmed by this form of action depends on whether any "class" arbitration decision will be binding on absent class members.

"It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment . . . in which he is not designated as a party or to which he has not been made a party by service of process." *Hansberry v. Lee*, 311 U.S. 32, 40 (1940); *see also Pennoyer v. Neff*, 95 U.S. 714 (1877) (mem.). Class actions represent a narrow exception to this "deep-rooted historic tradition." *Martin v. Wilks*, 490 U.S. 755, 762 (1989) (internal quotations omitted); *see Hansberry*, 311 U.S. at 41. This Court has carefully guarded the rights of absent class members, who have a protected property interest under the Due Process Clause. *See Hansberry*, 311 U.S. at 42. Class actions are binding on absent class members only if due process has been afforded them. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999); *Martin*, 490 U.S. at 762 n.2; *see also Hansberry*, 311 U.S. at 42. The requirement of due process is now embodied, in federal judicial proceedings, in Federal Rule of Civil Procedure 23, which was adopted pursuant to the Constitution and the laws of the United States and which determines what is necessary, and generally sufficient, to protect the rights of absent parties (and therefore to bind them). But it is argued that there is no such basis for imposing requirements that assure the rights of absent parties (or bind them) in an arbitration conducted pursuant to a private agreement between one lender and one customer.

1. *Forced "Class Arbitrations" May Not Be Binding on Absent Plaintiff "Class" Members.*

Consumer advocates have argued that there is simply no basis for binding absent plaintiff "class" members to the results of a forced "class arbitration." Even if they have entered into their own one-on-one arbitration agreements, they have not, it is asserted, agreed to have their claims (if any) resolved by a private decision maker chosen in somebody else's arbitration proceeding, or in a class format in which their own participation will not be what they bargained for.

The core of this argument is that judicial class actions are "state-enabled" mechanisms, *see* Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. Pa. L. Rev. 2119, 2144-48 (2000), and both the class action device and the judges that oversee them derive their legitimacy from our whole system of government. Arbitrators, however, derive their legitimacy from the parties' private contract. *Cf. United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960) (noting that an arbitrator's "award is legitimate only so long as it draws its essence from the" parties' agreement). Unless individuals have agreed to have their claims decided in a class arbitration in which they will not be direct participants, an arbitrator cannot deal with their claims with either the governmental legitimacy of a court deciding a class action or the contractual legitimacy of an arbitrator deciding a single case. Consumer advocates have stated quite clearly, that "arbitral resolution of the claims of a plaintiff class cannot have preclusive effect on absent class members since arbitrators have no authority to bind absent parties." *See* Brief *Amicus Curiae* of Public Citizen at 23-24, *Green Tree Fin. Corp.—Alabama v. Randolph*, No. 99-1235 (U.S. 2000).

The legitimacy problem is illustrated in this case by the provision in the arbitration clause that specifically reserved the selection of the arbitrator *to the parties whose interests*

were at stake. ("All disputes, claims, or controversies . . . shall be resolved by binding arbitration by one arbitrator selected by us with consent of you." Pet. App. 110a.) Commentators have objected that, in cases like this, "absent class members will ultimately be bound by the ruling of an arbitrator they had absolutely no role in selecting," Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 Wm. & Mary L. Rev. 1, 112 (2000),[6] but surely the true problem is the opposite: arguably, they cannot be bound at all.

Moreover, unlike court proceedings, which are presumptively open, *see, e.g., Press Enter. Co. v. Superior Court*, 464 U.S. 501, 507 (1984), arbitration is a private dispute resolution mechanism, whose proceedings are not necessarily even memorialized in a transcript. *E.g.*, Sternlight, 42 Wm. & Mary L. Rev. at 114. This is not a problem (and may be an advantage) in resolving one-on-one disputes, but private proceedings are wholly unworkable where the rights of "absent class members" are being decided. *See Hansberry*, 311 U.S. at 41.

Another important objective of the protections afforded in judicial class actions is to prevent "the fraudulent and collusive sacrifice of the rights of absent parties." *Hansberry*, 311 U.S. at 45; Herbert Newberg & Alba Conte, 2 *Newberg on Class Actions* § 11.65 (3d ed. 1992). The key to preventing class representatives and defendants from engineering a course of litigation or settlement that is unfair to absent persons is the role of the trial judge. But because arbitrators who are selected by only the present parties lack tenure, and have no "jurisdiction" beyond what the parties have conferred on them, they may be far less willing or able to protect

[6] As Professor Sternlight notes, "the arbitrator will have been selected at least in part by the named plaintiffs or their attorneys, not by the absent class members. Thus, it is difficult to see how such an arbitrator would play the role of the court in checking possible self-dealing." *Id.* at 113 (citations omitted).

absentees against collusion by the parties who appointed them.

It is especially hard to see how a forced "class arbitration" could be *settled* with an assurance of fairness to all. There are no established rules, either in law or the private contracts in this case, for arbitrator approval of class settlements or for participation by absent persons. For example, in an arbitration any objectors would—unless the entire proceedings have been conducted in a way largely foreign to arbitration—have no opportunity to scour the record to ensure that the settlement is appropriate.[7] In sum, it is all but impossible to imagine a court holding that the outcome of a forced class arbitration, whether decision or settlement, was binding on absent plaintiff "class" members—particularly if defendants prevail.

2. *Forced Class Arbitration Is Unfair to Defendants.*

If forced class arbitration decisions are not binding on absent plaintiff class members, then forced class arbitrations are obviously fundamentally unfair to the defendant: if he wins he defeats only the named plaintiffs but if he loses the rest of the class may latch on. One of the functions of class action procedures is at least roughly to level the playing field, so that the stakes are the same on both sides. *See United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 402-03 (1980) (noting that one of the benefits of class actions is "the

[7] *See* Steven A. Meyerowitz, *The Arbitration Alternative*, 71 A.B.A. J. 78, 80 (1985) (noting that in general, arbitrations are not open to the public and there is no record of the proceedings kept); *see also, e.g., United Steelworkers of Am.*, 363 U.S. at 598 ("[a]rbitrators have no obligation . . . to give their reasons for an award at all"); *Raytheon Co. v. Automated Bus. Sys., Inc.*, 882 F.2d 6, 8-9 (1st Cir. 1989) (holding that arbitrators are not required to issue written opinions); *Sobel v. Hertz, Warner & Co.*, 469 F.2d 1211, 1214-15 (2d Cir. 1972) (same). By contrast, objectors in court are free to review the record to assist them in attacking any settlement. *See generally* 2 *Newberg on Class Actions* §§ 11.57-58 (discussing the rights of objectors to class settlements).

protection of the defendant from inconsistent obligations"). A forced procedure that leaves a defendant with far more at risk than the plaintiff will bring a swift end to many agreements to arbitrate.

This point is illustrated in a related context. Under Federal Rule of Civil Procedure 23(f), a court's decision to certify a case as a class action may be immediately appealed. The rule was adopted to address the concern that "[a]n order granting certification ... may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability." Fed. R. Civ. P. 23 (Advisory Committee Notes).[8] But a defendant in a forced class arbitration faces a far worse threat: it has no offsetting chance to *win* a class victory, and it typically has no avenue for immediate appeal of the "class" determination and has only limited judicial review after an arbitration award has been entered. *See* 9 U.S.C. § 10; *see also, e.g., Flexible Mfg. Sys. Pty. Ltd v. Super Prods. Corp.*, 86 F.3d 96 (7th Cir. 1996); *Ainsworth v. Skurnick*, 960 F.2d 939 (11th Cir. 1992). Such a procedure is substantially less fair to a defendant than either a class action in court or an individual arbitration.

II. FORCED CLASS ARBITRATION IS AN ATTACK ON ARBITRATION ITSELF.

The decision below reflects a modern and more sophisticated form of the old judicial hostility toward arbitration. Uncorrected, it will bring a swift end to arbitration agreements in consumer contracts.[9]

---

[8] *See also* Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973) (discussing the problem of "blackmail settlements" involved in large scale multistate class actions); *cf. In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1294, 1298 (7th Cir 1995) (granting the "extraordinary" relief of mandamus to review district court decision on class certification because of "pressure to settle" even in case where previous similar suits had been won by defendant).

[9] The problems discussed in this part are even more serious than the split of authority between the majority and minority views. A lender or other firm does not know where a customer will reside in the future or initiate proceedings. If any jurisdictions force "class arbitrations," every contract that provides for arbitration carries some risk of these unacceptably one-sided proceedings.

A. Forced Class Arbitration Threatens the Viability of Arbitration Agreements in Consumer Contracts.

Parties enter into arbitration agreements to avoid the expense and delay of litigation. As the Senate Report stated, "[t]he desire to avoid the delay and expense of litigation persists. The desire grows with time and as delays and expenses increase." S. Rep. No. 68-536, at 3 (1924).[10] Over the latter part of the twentieth century, arbitration evolved to provide a quick, inexpensive, and fair alternative to litigation. H.R. Rep. No. 97-542, at 13 (1982) ("The advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility ... ; [and] it is often more flexible in regard to scheduling ...."); *see also Allied-Bruce Terminix*, 513 U.S. at 280 ("Indeed, arbitration's advantages often would seem helpful to individuals, ... complaining about a product, who need a less expensive alternative to litigation.").

Courts, however, have remained hostile. One form of that hostility, illustrated in this case, is to impose class procedures. Then, in an attempt to appear to deal with the obvious issues of fairness, courts and commentators suggest significant judicial oversight and interference in the arbitration process. For example, in this *Bazzle* case, the trial court, not the arbitrator, considered the class certification motion and ordered certification of the class. Pet. App. 3a. The result is to replace the arbitration the parties agreed to with a con-

---

[10] The Report went on to document the fact that arbitration typically takes weeks where litigation typically takes years; that the costs of arbitration are "trifling" compared to the expense of litigation; and that the participants in arbitration—"winners and losers alike"—are broadly satisfied with the arbitration process. *Id.*

glomerate proceeding that is more to the courts' liking. Even courts that compel forced class arbitration concede that "[w]ithout doubt a judicially ordered classwide arbitration would entail a greater degree of judicial involvement than is normally associated with arbitration." *Keating v. Superior Court*, 645 P.2d 1192, 1209 (Cal. 1982), *rev'd in part on other grounds sub nom. Southland Corp. v. Keating*, 465 U.S. 1 (1984); *see also Blue Cross v. Superior Court*, 78 Cal. Rptr. 2d 779, 786-87 (Ct. App. 1998); *Dickler v. Shearson Lehman Hutton, Inc.*, 596 A.2d 860, 866 (Pa. Super. Ct. 1991). Indeed, these courts have gone so far as to acknowledge that it will be difficult for courts "to avoid judicial intrusion upon the merits of the dispute, or upon the conduct of the proceedings themselves and to minimize complexity, costs, or delay." *Keating*, 645 P.2d at 1209 (citing *Class Wide Arbitration: Efficient Adjudication or Procedural Quagmire?*, 67 Va. L. Rev. 789 (1981)). Courts may be forced, as the court in *Bazzle* below did, "to make initial determinations regarding certification and notice to the class." *Id.* Alternatively, the Court may decide it must review such decisions made initially by the arbitrator. In either event, if court involvement is required to determine whether a class should be certified, "it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 160 (1982). This will require the courts to make decisions on certification based on the courts understanding of "the claims, defenses, relevant facts, and applicable substantive law." *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996). Moreover, any such "careful court monitoring" would likely have to continue throughout the litigation. 1 *Newberg on Class Actions* § 1.13. Courts may also be required to "exercise a measure of external supervision" over dismissals and settlements in forced class arbitrations. *Keating*, 645 P.2d at 1209.

At best, these conglomerate proceedings would defeat the very purposes arbitration was designed to serve. This

form of judicial intervention, and multiplication of proceedings, is exactly what the FAA was intended to prevent and runs contrary to the simplifying purpose of agreeing to private arbitration instead of judicial resolution of disputes. As the Fourth Circuit noted in another context, such judicial participation would "reduce arbitral proceedings to the status of preliminary hearings. Parties would cease to utilize a process that no longer had finality." *Remmey v. Paine Webber, Inc.*, 32 F.3d 143, 146 (4th Cir. 1994). So it is here.[11]

Most important, parties simply will not offer or agree to an arbitration agreement if that agreement can cause them to be forced into a proceeding that is both unfair and clumsy. This may be what some courts who are hostile to arbitration hope, but it is contrary to federal policy embodied in the FAA.

B. Parties May Not Be Able To Avoid the Issues in This Case by Drafting Around Them.

Finally, we note that parties cannot necessarily avoid the threat of forced class arbitration by stating even more explicitly in their agreements that arbitration will not be done on a class basis. The court below suggested (Pet. App. 22a n.21) that it might reject an arbitration agreement containing such a bar as unconscionable. Some other courts have already done so. Their hostility to arbitration could hardly be more clear. *See, e.g., Comb v. Paypal, Inc.*, 218 F. Supp. 2d 1165, 1175-76 (N.D. Cal. 2002); *ACORN v. Household Int'l, Inc.*, 211 F. Supp. 2d 1160, 1171, 1174 (N.D. Cal. 2002); *Ting v. AT&T*,

---

[11] These types of concerns led the securities industry to reject class arbitration, because, as the Securities and Exchange Commission concluded: "Over the years of the evolution of class action litigation, the courts have developed the procedures and expertise for managing class actions. Duplication of the often complex procedural safeguards necessary for these hybrid lawsuits is unnecessary [in arbitration]." SEC, Order Approving Proposed Rule Change Relating to the Exclusion of Class Actions from Arbitration Proceedings, 57 Fed. Reg. 52,659, 52,661 (Nov. 4, 1992).

182 F. Supp. 2d 902, 931 (N.D. Cal. 2002), *appeal filed*, No. 02-15416 (9th Cir. 2002); *see also, e.g., Lozada v. Dale Baker Oldsmobile, Inc.*, 91 F. Supp. 2d 1087, 1104-05 (W.D. Mich. 2000); *Leonard v. Terminix Int'l Co., L.P.*, No. 1010555, 2002 WL 31341084, at *8 (Ala. Oct. 18, 2002); *Lytle v. CitiFinancial Servs., Inc.*, No. 42 EDA 2001, 2002 WL 31388882, at *19 (Pa. Super. Ct. Oct. 24, 2002); *Szetela v. Discover Bank*, 118 Cal. Rptr. 2d 862, 867-68 (Ct. App. 2002).[12]

This Court has held that arbitration agreements are enforceable so long as the parties can effectively vindicate their substantive rights. *See, e.g., Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 229-30 (1987); *see also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991) (rejecting a claim that "arbitration procedures cannot adequately further the purposes of the ADEA because they do not provide for . . . class actions"). The combination of

[12] The majority rule is that arbitration agreements that prohibit class arbitrations or class actions in favor of individual arbitration are fully enforceable under the FAA. *See, e.g., Randolph v. Green Tree Fin. Corp.—Alabama*, 244 F.3d 814 (11th Cir. 2001) (on remand from the Supreme Court, holding that agreement to arbitrate TILA claims is enforceable, even though it precludes class actions); *Johnson v. W. Suburban Bank*, 225 F.3d 366, 369 (3d Cir. 2000) (holding that TILA claims are subject to binding arbitration); *Baron v. Best Buy Co.*, No. 99-14028, slip op. at 3 (11th Cir. June 1, 2001) (arbitration clause enforceable, "*even if class actions are not maintainable under the clause*") (emphasis added) (citing *Randolph*, 244 F.3d at 818-19 and *Bowen v. First Family Fin. Servs., Inc.*, 233 F.3d 1331, 1338 (11th Cir. 2000)); *Marsh v. First USA Bank, N.A.*, 103 F. Supp. 2d 909, 924 (N.D. Tex. 2000) ("While Plaintiffs may not be able to utilize the procedural vehicle of a class action in arbitration, they retain all of their substantive statutory rights . . . ."); *Hale v. First USA Bank, N.A.*, No. 00CIV5406JGK, 2001 WL 687371, at *7 (S.D.N.Y. June 19, 2001) (citing authority); *Sagal v. First USA Bank, N.A.*, 69 F. Supp. 2d 627, 631-32 (D. Del. 1999), *aff'd*, 254 F.3d 1078 (3d Cir. 2001); *Lloyd v. MBNA America Bank, N.A.*, No. Civ.A. 00-109-SLR, 2001 WL 194300, at *3 (D. Del. Feb. 22, 2001); *Zawikowski v. Beneficial Nat'l Bank*, No. 98C2178, 1999 WL 35304, at *2 (N.D. Ill. Jan. 11, 1999).

the cases cited above and the rulings in *Bazzle* et al. is to supply another condition: arbitration agreements must provide for class action arbitrations. This is precisely the sort of condition to the enforcement of an arbitration agreement that is forbidden under the FAA.[13]

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

LOUIS R. COHEN
Counsel of Record
CHRISTOPHER R. LIPSETT
ERIC J. MOGILNICKI
MICHAEL D. LEFFEL
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

Counsel for Amici Curiae

NOVEMBER 25, 2002

[13] *See Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (holding that States are "precluded . . . from singling out arbitration provisions for suspect status"); *Perry v. Thomas*, 482 U.S. 483 (1987) (striking California statute prohibiting arbitration of wage collection actions); *Southland Corp. v. Keating*, 465 U.S. 1, 13 (1984) ("[T]he purpose of the [FAA] was to assure those who desired arbitration and whose contracts related to interstate commerce that their expectations would not be undermined by . . . state courts or legislatures.") (alterations in original).